BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

VERNON V. GRUBER	)	
Claimant	)	
VS.	)	
	)	Docket No. 193,331
PIONEER CONSTRUCTION COMPANY	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals from an Award entered by Special Administrative Law Judge Douglas F. Martin dated March 28, 1996. The Appeals Board heard oral argument September 10, 1996.

APPEARANCES

Claimant appeared by and through his attorney, David H. Farris of Wichita, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Jerry M. Ward of Great Bend, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed the record listed in the Award. The Appeals Board has also adopted the stipulations listed in the Award.

ISSUES

Respondent listed two issues in its Request for Review:

(1) Whether claimant suffered personal injury by accident arising out of and in the course of his employment with respondent.

(2) The nature and extent of claimant's disability.

At oral argument respondent withdrew the first listed issue and the only issue to be determined by the Appeals Board is, therefore, the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds claimant has a 95.5 percent permanent partial general disability.

Claimant was injured on March 15, 1994, while performing duties as a general laborer for respondent. While attempting to free concrete from a form, a long bar he was using gave way and claimant was thrown against the wall.

As above indicated, the dispute on appeal relates to the nature and extent of claimant's disability. Although respondent does not concede claimant is entitled to work disability, the principal dispute relates to the findings by the Special Administrative Law Judge on the two-prong test for work disability. Work disability is defined in K.S.A. 44-510e as follows:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury."

The findings by the Special Administrative Law Judge on both task loss and wage loss are disputed. The dispute, as to both prongs, turns primarily on the interpretation and application of the testimony of Dr. Ernest R. Schlachter and Dr. C. Reiff Brown, as well as the testimony of the claimant and the task list prepared by Mr. Jerry Hardin.

After the injury, respondent provided medical treatment and referrals led eventually to treatment by Dr. Brown. Dr. Brown initially saw claimant April 27, 1994, and released claimant from his care on September 1, 1994. Between those two dates Dr. Brown provided conservative treatment which included medication, epidural injections, and a work-oriented exercise program. Dr. Brown also ordered a bone scan and MRI. The bone scan test results were normal. The MRI revealed early degenerative changes at L4-5 and spondylosis at L5. Dr. Brown diagnosed a strain and sprain aggravating the underlying spondylosis and degenerative disc disease.

Claimant offered the testimony of Dr. Schlachter. Dr. Schlachter examined claimant on October 11, 1994. He diagnosed chronic lumbosacral sprain aggravating a preexisting spondylolisthesis of L5-S1 with disc disease. He rated claimant's impairment at a 15

percent impairment of function to the body as a whole. He recommended permanent restrictions against repetitive lifting of more than 30 pounds with no single lifts of more than 40 pounds. He also recommended claimant avoid repetitive bending, stooping, kneeling, squatting, or working in awkward positions. He concluded that claimant should have a job where he could sit part-time and stand part-time. Dr. Schlachter reviewed a task list prepared by Mr. Jerry Hardin. Dr. Schlachter agreed that claimant would be unable to perform 91 percent of the tasks he performed in his work history for the previous 15 years.

The Administrative Law Judge found claimant suffered a 70 percent loss of ability to perform tasks he had performed in his work in the preceding 15 years. Claimant asserts that the only competent evidence in the record shows a 91 percent loss of ability to perform tasks. Respondent, on the other hand, emphasizes testimony of Dr. Brown, the treating physician, saying that in his opinion claimant remained able to perform most of the tasks he had performed in his previous 15-year work history. Dr. Brown rated claimant's functional impairment at 10 percent to the body as a whole. He recommended permanent restrictions against lifting more than 75 pounds occasionally and 40 pounds frequently.

The Appeals Board finds most convincing the opinion expressed by Dr. Schlachter. Claimant's work history included four general areas or types of work. He worked as a construction worker, a roughneck, a plumber, and a sheet metal machinist's helper. He had also worked as a truck driver. Claimant testified from a detailed list of tasks that he could not perform most of those tasks with the exception of driving a truck. Dr. Schlachter reviewed those tasks and agreed claimant could not perform 91 percent of the tasks listed.

Dr. Brown, on the other hand, initially indicated claimant could perform most of the tasks in his previous work. Dr. Brown, for example, testified claimant can perform most of the tasks in the job claimant was performing at the time of his injury. Dr. Brown's testimony clearly indicates, however, that a certain amount of accommodation would be required to allow claimant to load and unload the trucks. For the other jobs, Dr. Brown simply testified that he was generally familiar with the job and believed claimant could perform most of the duties. Again, in several instances, he testified that a certain modification would be required. Dr. Brown did not have a detailed list of tasks from these other positions. He also indicated he could not say a percentage.

Dr. Brown's conclusions are not consistent with the results of the functional capacity evaluation. Dr. Brown testified that his work restrictions were based upon the diagnosis and what he would expect for a man of claimant's age. He did not consider a functional capacity evaluation to be indicative of permanent work restrictions because the functional capacity only related to what claimant was capable of doing at the time the test was done and it would be normal to expect there had been some deconditioning.

A functional capacity evaluation was done in this case on December 15, 1994, several months after Dr. Brown released claimant from his care. The examination was done by a physical therapist whom Dr. Brown frequently uses. The test yielded a valid profile. A report dated December 16, 1994, described the results as follows:

> "The results indicate that Mr. Gruber is able to work at the SEDENTARY-LIGHT Physical Demand Level for a 4 hour day according to the Dictionary

> of Occupational Titles, U.S. Department of Labor, 1991. His specific acceptable 12" Lift capability was 15 lbs. and Torso Lift capability was 0 lbs."

Even if we assume the functional capacity evaluation results reflect a certain amount of deconditioning, the results are more restrictive than those recommended by Dr. Schlachter. On balance the Appeals Board finds the limitations and restrictions recommended by Dr. Schlachter to be more appropriate. Accordingly, the Appeals Board finds claimant suffered a 91 percent loss of ability to perform tasks.

In determining the wage loss prong of the test for work disability, the Administrative Law Judge applied the principles set forth by the Kansas Court of Appeals in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995). The Special Administrative Law Judge concluded that claimant had not made reasonable efforts to obtain employment following his injury. For that reason the Special Administrative Law Judge concluded that claimant has a zero percent loss of wage.

The Appeals Board does not agree that this is the proper case for an application of the Foulk principle. In the Foulk case, claimant was offered employment within her restrictions and declined the offer. There was no evidence in this case of an offer of employment. Claimant did make efforts to find work. He applied at several employers and testified that he read the newspaper each day. He listed his name at the unemployment office. The Appeals Board concludes that respondent has not met its burden of proving that claimant's conduct was the equivalent of rejecting an offer of employment. Accordingly, claimant is entitled to the actual wage loss or 100 percent. Guerrero v. Dold Foods, Inc. , 22 Kan. App. 2d 53, 913 P. 2d 612 (1995); Ultreras v. Excel Corp. , Docket No. 193,272 (March 1996).

By statute the wage loss factor and the task loss factor are averaged. In this case the result is a 95.5 percent work disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge Douglas F. Martin dated March 28, 1996, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Vernon V. Gruber, and against the respondent, Pioneer Construction Company, and its insurance carrier, Travelers Insurance Company, for an accidental injury which occurred on March 15, 1994, and based upon an average weekly wage of $343.45 for 22 weeks of temporary total disability compensation at the rate of $228.98 per week or $5,037.56, followed by 389.64 weeks of permanent partial disability compensation at the rate of $228.98 per week or $89,219.77, for a 95.5% permanent partial work disability, making a total award of $94,257.33.

As of September 30, 1996, there is due and owing claimant 22 weeks of temporary total disability compensation at the rate of $228.98 per week or $5,037.56, followed by

110.86 weeks of permanent partial disability compensation at the rate of $228.98 per week in the sum of $25,384.72 for a total of $30,422.28, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $63,835.05 is to be paid for 278.78 weeks at the rate of $228.98 per week, until fully paid or further order of the Director.

The Appeals Board adopts all other orders in the Award by the Administrative Law Judge not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of September 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David H. Farris, Wichita, KS
Jerry M. Ward, Great Bend, KS
Administrative Law Judge, Garden City, KS
Douglas F. Martin, Special Administrative Law Judge
Philip S. Harness, Director